UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

A LA FRANCAISE, INC., a Washington corporation, a wholly-owned subsidiary of Sara Lee Corporation, a Maryland corporation

Employer

and Case 19-RC-13762

BAKERY SALESMEN, LOCAL 227, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[1] in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6)(7) of the Act, for the following reasons:

By this petition the Union seeks to represent a unit of the Employer's drivers. The parties are in agreement about the terms of an election, but disagree about the need for one. The Employer asserts that the unit employees will be converted to independent contractors by April 15 or 30, 1999; thus, there is no point in having an election. The Union asserts that the conversion will not transpire that quickly, the evidence is murky about their proposed independent contractor status, and the drivers will still be statutory employees after the changes; thus, an election should be conducted.

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[1] The parties filed briefs, which have been considered.

Independent Contractors?

A La Francaise ("ALF") is a non-retail baker and distributor of French bread and baguettes, in Seattle, Washington. Effective about February 2, 1999 it was purchased by Sara Lee Corporation ("SLC") and will run as a wholly owned subsidiary. There is no history of collective bargaining.

Simon Mani is the President and CEO of the US fresh product section of the Sara Lee enterprise. Mani has had a general policy of having SLC's fresh product in the U.S. distributed by independent contractors, and of converting any driver employees of enterprises it might purchase to such status. When the ALF purchase was under consideration, this practice and intent was discussed up front with the seller, Joan Johnson. This general idea was conveyed by her to at least some supervisors as early as October 1998 and leaked or gradually disseminated to employees beginning in December. The first "official" announcement to employees was shortly before the February 2, 1999 transaction closing, about January 26. The intent is to structure the independent contractor relationship as a franchise, which requires registration with the State of Washington before the matter can be proposed to any potential franchisee. It is anticipated that the registration process will be complete by April 1. At that time the drivers will be given a formal proposal and have right of first refusal, in order of seniority, to take on any territory before anything is offered to any outsider.

Under the Plan envisioned by the Employer and conveyed in general oral terms to employees beginning at the end of January, but in the limited fashion required by the Washington State regulations, franchisees will be offered a geographic territory in which they will be exclusive distributors of all Sara Lee fresh products[2]. This would include ALF's established product line, as well as additional fresh SLC product. The territory will be sold initially by Sara Lee at a price which it determines, which is a multiple of the territory's sales. Current drivers will not have to pay the fee if they remain franchisees for at least four years, but outside initial purchasers would pay the fee up front. They will handle whatever products they wish, including those of competitors; they may handle other, unrelated products as well. Franchisees will set their own starting times and delivery times and will be free to hire employees of their own choosing, if they find it useful to do so.

Franchisees will be responsible for their own insurance; the only SLC insurance requirement will be a set minimum of liability insurance in case Sara Lee were joined in any suit, but Sara Lee will not be named as an insured in the policy. Franchisees will purchase whatever product they desire, but once accepted, there will be no returns or credits, even for defective or stale products. However, it does appear that there may/will be some built-in allowance in pricing that distinguishes between those customers that are likely to have many stales as compared with those who have limited stales. Otherwise, there will be set prices for every product and distributor.

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[2] The entire relationship between the parties will be set forth in a formal contract. The agreement cannot be canceled except by mutual agreement or by breach of the contract.

Sara Lee will have no control over franchisees' employees, if any. It will withhold no taxes, provide no workers' compensation or other insurance or fringe benefits to franchisees or their employees. There will be no guaranteed minimum earnings or "wages" for the franchisees. Each franchisee will have an incentive, and ability, to increase earnings by increasing sales; this will enhance weekly earnings, as well as the value of the route in the event it is sold. Franchisees will be permitted to sell or buy routes, or parts of them, or to exchange same - all they will have to do is inform SLC. Sellers will be responsible for training buyers.

Sara Lee will require vans of a certain minimum size to ensure that the product makes its way to the store shelves without damage. The only other requirement about trucks is that proper hygiene be maintained. Drivers, for reasons of convenience/ operational necessity, will require a somewhat customized van that meshes physically with Sara Lee's distribution equipment. They will be responsible for obtaining and maintaining their own trucks of their own selection through their own sources, which vehicles may be decorated in any way the see fit. The Employer will have no role in the securing of trucks other than refer franchisees to certain well-known, but unrelated, enterprises specializing in leasing out such vehicles, but use of these enterprises is not required. The current vehicles will not be offered to the franchisees, as they do not meet the size requirements. Franchisees will also need to purchase or lease, from an independent source, some sort of electronic ordering or invoicing device. The exact role of this gadget, the necessity of its use and its interface with SLC was not developed on the record.

While there are multiple elements tending to make the franchisees independent businesses, they will not be totally abandoned to the whims of commerce; SLC will provide some assistance or guidance. Each franchisee will have a "supervisor". The role of the supervisor is to assist them in their relationship with the stores; the record is weak regarding their role. It appears that they will help in problem resolution with business customers. They will help in obtaining display space and with in-store promotions. A supervisor might help out a time-pressed franchisee who needed such a display set up. There will be no disciplinary authority - that would be a matter for the legal department, and only if the agreement were breached. Beyond that, we can perhaps surmise that the supervisors will "advise" franchisees on possible improvements they might make so that ultimately their, and SLC's sales, will increase, but the record is not clear. The record does not indicate that they will have any authority over the franchisees other than enforcement of the franchise agreement. The record also hints that these SLC representatives will run sales contests to energize the franchisees.

Another aspect that will limit entrepreneurial risk is the franchiser's assumption of certain credit, collection and cash flow burdens. Thus, SLC will "accept" certain customers. This means that upon request, SLC may opt to accept a customer's risk of payment. Once that happens - there is no right to such an arrangement - the franchisee may turn in accounts payable from that customer directly to SLC. Sara Lee will accept the invoices as cash, assume the risk of non-payment, and use them as an offset against the franchisee's accounts payable to Sara Lee. SLC can decide that the customer is not credit-worthy, and leave the decision to extend credit and the risk of collection on the franchisee. It appears that this collection arrangement is a mutual convenience for both franchisee and customer; the customer, such as a chain grocery, could agglomerate all invoices from the various franchisees into one periodic mass payment to

SLC. The risk of non-collection from these customers for either Sara Lee or the franchisee is likely quite small, since they are largely well-established retailers. This arrangement also reduces the franchisees' cash flow problems, because they may convert a sale into instant revenue, rather than having to await a periodic check from the customer. Finally, the franchiser has eliminated the risk of one franchisee "stealing" another's customers - for instance, by lowering prices - by providing for exclusive territories.

Based on the foregoing, I find it indisputably clear that SLC plans to convert its admitted statutory employees into non-employee independent contractors. While there are some elements of the contract that will keep certain current business risks with SLC, where they would not lie in a total arms-length relationship, these elements are insufficient to over-ride the multiple factors demonstrating genuine independent contractor status. At bottom, these franchisees will bear substantial business risk/gain, depending on how they service their customers. If they perform poorly, they will lose customers, reduce weekly profits and undermine the value of their territory; conversely, if they "grow" sales or customers, their income and route value will increase substantially. Moreover, they will have very substantial freedom in how they go about conducting their businesses. The only real limitations are hygiene/size limitations on the van, the requirement for a minimum amount of liability insurance, and some obvious conduct rules, the breach of which could impact SLC's reputation or sales (no drinking on the route, no stealing from customers.) Unlike the recent *Roadway Package System, Inc.* case, 326 NLRB No. 72 (1998), in which the drivers were found to be statutory employees, we see no evidence of SLC being intertwined in the provision of trucks and no limitations on providing other services during the work day. In the instant case, it appears that a driver might well wish to take on another line of product commonly sold in supermarkets, whereas Roadway drivers were strictly limited to Roadway work during the Roadway day[3]. Unlike *Roadway*, franchisees will be able to expand their routes, instead of having them traded away involuntarily at Roadway's apparent whim. Again in contrast to Roadway, sales of one's business will not be closely restricted.

The Union argues that it is not all that clear what the final arrangement will be, that there are a myriad of factors to consider and we cannot know each of them until after the change takes place. However, the facts as presented hardly make a close case, such that some variation therefrom would easily or likely make a difference. Moreover, CEO Simon testified that independent contractors were its standard practice and had been for some 15+ years. The Union asked multiple questions about the arrangements and never brought any testimony into serious dispute.[4] The Union did not subpoena a "typical" contract, or the most recent arrangement at the last enterprise SLC took over, or attempt to elicit any evidence about how "it" actually worked in practice. The Union's own witnesses were not inconsistent with what the Employer said it told employees about the general arrangements. Thus, I do not find any serious doubt on this record

[3] At other times, they theoretically could drive for others, or use their truck in some other endeavor, but that right was illusory, since there were limitations on displaying the otherwise required Roadway logos.

[4] The sole exception concerned whether the plan envisioned immediate conversion of all drivers or a gradual changeover, and whether there was a change in plans at some point to that testified to by Simon.

that the *plan* is to have distribution handled by independent contractors, nor any reason to seriously doubt that the plan discussed on the record is not accurate or truthful.[5]

When?

Thus, it is clear that the Employer plans to change all unit members to non-employee independent contractors. The next question is when? The Union argues that the plan cannot be installed by April 30, 1999. The Employer asserts it will be. In addition, the Union, while essentially conceding that the Board would not order an election if ALF were clearly going out of business by April 30, or even somewhat later, asserts that the Board's no-election policy should be different when the issue is conversion to independent contractor status, rather than going out of business, because the latter is more easily tested, while the former has multiple variables, many of which will not be clearly manifested until after conversion.

The evidence indicates that the Employer's *plan* is to have the complete conversion established by April 15 to April 30, 1999. While the evidence is clear that the conversion will take place, it might be said that the effective date appears a bit ambitious. The Employer cannot even offer its employees, or anyone else, a franchise until cleared by the State of Washington. It is estimated this will occur about April 1. Frankly it is difficult to envision how the entire process can be carried out by either target date. The drivers will have to be offered the routes, the franchise fees and the contract terms. Surely they will want to careful consider embarking on such a major change in their life course, with its attendant financial risks as entrepreneurs. One would envision the need to contact a CPA, an attorney and certainly to discuss with one's family. Then, assuming one elects to become a businessperson, they will need to consider the routes offered, and pick one or more. This will be a sequential process, with the most senior driver making the first pick(s), then the selection process moving to the next. If they were to pick more than one route, they would have to find an employee[6]. Entering into business requires a myriad of tax and licensing details. A truck is a necessity; vehicles will need to be reviewed, priced and selected, probably acquired through a lessor, with a credit check.[7] Liability insurance and likely other forms of insurance will need to be obtained. This all assumes that all routes will be sold, either to current drivers or outsiders (i.e., that some routes are not left unsold, subject to further marketing efforts to find a franchisee, with routes needing to be covered in the interim), and all deals closed and implemented by the target date.

On the other hand, there is no *evidence* to support serious questions about the viability of the April 30 target. I am in no position to take administrative notice of how long these various steps should take. Perhaps I could conclude that "common sense" would dictate that they could

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[5] In the event that the free-wheeling, junior capitalist plan testified to changes to one, for example, of SLC micro-management of franchisees, or otherwise substantially differs from reality, I will, upon proper motion and supporting evidence, consider re-opening the record for re-examination of the independent contractor issue.

[6] There are 13-14 routes, but 28-30 drivers. The record does not reflect how that plays out.

[7] Recall that SLC does not dictate a vehicle other than its size, and does not participate in the obtaining of a truck, which presumably would mean it does not act as guarantor to the leasing or lending company.

not likely be generally accomplished by April 30, but if I did that, I would also conclude that May 30 is certainly plausible.

Election?

Even assuming arguendo that the actuation date were as late as May 30, 1999, I find that it would not be appropriate under Board policy to direct an election. In such case, the effectuation date at the outside would be 3 1/2 months after the petition filing, 3 months after the hearing close, 2 1/2 months after the direction of an election, and about 1 1/2 months after the earliest possible certification. See, e.g*., Martin Marietta Aluminum, Inc*., 214 NLRB 646 (1974), where the plant was winding down, in the process of closing. The petition was filed 4 1/2 months before the planned plant closure; by the election date (apparently about June 21, the day the request for review was granted) 50% would have been terminated; most of the balance of the employees would have been terminated within another 2+ months. In the instant situation, under much the same timetable, the entire workforce will also be gone.

In sum, the record is clear that the employees will become independent contractors by May 31, if not April 30 - the record demonstrates no basis to challenge the testimonial projection. It is true that "things" could happen, whereby true independent contractor status might not emerge, or disappear over time. However, this is speculative and provides no basis to make a contrary conclusion. I find no case holding that termination of the unit due to conversion to independent contractor status should be treated any differently from termination due to plant closure. I find no basis to make such a distinction based on this record. The unit termination will be complete, or surely nearly so, by slightly over one month from the earliest election day. Accordingly, I am constrained by Board policy ignore the short-term possibility/benefits of limited negotiation on topics concerning the conversion and its effects on drivers, and to dismiss the petition.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive

Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by March 24, 1999.

DATED at Seattle, Washington, this 10th day of March, 1999.

/s/ PAUL EGGERT

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